

DOCKET NO. 2002.01.006.WS0
SERIAL NO. 10/024,687
PATENT

REMARKS

Claims 37-68 are pending in the application.

Claims 37-42, 46-54 and 58-68 have been rejected.

Claims 43-45 and 55-57 have been objected to.

Claims 37, 42, 43, 49, 54, 55, and 61 have been amended as set forth herein. Entry is respectfully requested.

Claims 37-68 remain pending in this application.

Reconsideration of the claims is respectfully requested.

I. ALLOWABLE SUBJECT MATTER

The Examiner objected to Claims 43-45 and 55-57 as being dependent upon a rejected base claim, but suggested that Claims 43-45 and 55-57 would be allowable if it were rewritten in independent form including all the limitations of the base and intervening claims. The Examiner is thanked for the indication of allowable subject matter; various amendments are made accordingly.

II. CLAIM REJECTION UNDER 35 U.S.C. § 103

Claims 37-41 and 49-53 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,966,384 to *Felix et al.*, hereinafter "Felix" in view of U.S. Patent Publication No. 20020152342 to *Das et al.*, hereinafter "Das" and U.S. Patent No. 6373842 to

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Cloverdale et al., hereinafter "Cloverdale". Claims 42, 47, 48, 54, 59 and 60 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent Publication No. 20020152342 to *Das et al.*, hereinafter "Das" in view of U.S. Patent Publication No. 2001/0007819 to *Kubota*, hereinafter "Kubota" and U.S. Patent Publication No. 2001/0030953 to *Chang*, hereinafter "Chang". Claims 46 and 58 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Das, Kubota and Chang as applied to claims 42 and 54 above, and further in view of Cloverdale.

The Applicants respectfully traverse the rejection.

In rejecting claims under 35 U.S.C. § 103(a), the examiner bears the initial burden of establishing a *prima facie* case of obviousness. (*In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). See also *In re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984)). It is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. (*Id.* at 1073, 5 USPQ2d at 1598). In so doing, the examiner is expected to make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), viz., (1) the scope and content of the prior art; (2) the differences between the prior art and the claims at issue; and (3) the level of ordinary skill in the art. In addition to these factual determinations, the examiner must also provide "some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." (*In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006) (cited with approval in *KSR Int'l v. Teleflex Inc.*, 127 S. Ct. 1727, 1741, 82 USPQ2d 1385, 1396 (2007)).

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Absent such a *prima facie* case, the applicant is under no obligation to produce evidence of nonobviousness. MPEP § 2142, p. 2100-125 (8th ed. rev. 5, August 2006). To establish a *prima facie* case of obviousness, three basic criteria must be met: *Id.* First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. *Id.* Second, there must be a reasonable expectation of success. *Id.* Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. *Id.* The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure. *Id.* Accordingly, the Applicants respectfully request the Examiner withdraw the § 103 rejection with respect to these claims.

Claims 42 and 54 have been amended to add significant limitations from claims 43 and 55, respectively, indicated by the Examiner as allowable. Claims 42-48 and claims 54-60 are therefore believed allowable per the indication of allowable subject matter in the Office Action.

Independent claims 37 and 49 are amended to indicate that the claimed base station receives an A3 physical transition directive message from another base station to increase a bandwidth of a second channel to the mobile station, as described in the specification as filed, e.g. at page 34, line 19 – page 37, line 3. This limitation is not taught or suggested by any art of record, and Claims 37-41 and 49-53 are therefore believed allowable.

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Claim 61 is amended to clarify communications between the mobile station and two respective base stations, as described in the specification as filed, *e.g.* at page 34, line 19 – page 37, line 3, where the ACK/NACK is sent to (and received by) a different base station than the one sending data packets at the first data rate. This feature is not taught or suggested by the art of record, and claims 61-64 are therefore believed allowable.

Claim 65 is allowable with no amendment. Claim 61 requires “the apparatus is further capable of receiving at least one replacement data packet from said first base station and said second base station on said second channel at a second data rate, which is higher than said first data rate” (emphasis added). No art of record teaches or suggests that the replacement data packet can or should be received from both a first base station and a second base station, as claimed. Claim 65-68 are therefore believed allowable as written.

All rejections are therefore traversed or rendered moot. Entry of the amendments and reconsideration of the claims is respectfully requested. The Examiner is requested to telephone the undersigned to resolve any remaining issues.

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CONCLUSION

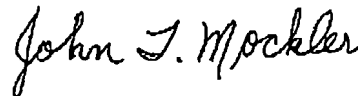
As a result of the foregoing, the Applicants assert that the remaining claims in the Application are in condition for allowance, and respectfully requests that this Application be passed to issue.

If any issues arise, or if the Examiner has any suggestions for expediting allowance of this Application, the Applicants respectfully invite the Examiner to contact the undersigned at the telephone number indicated below or at *jmockler@munckbutrus.com*.

The Commissioner is hereby authorized to charge any additional fees connected with this communication or credit any overpayment to Deposit Account No. 50-0208.

Respectfully submitted,

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